No. 22127

THE UNITED STATES CIRCUIT

COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELEANOR R. JESS,

Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY,
A Corporation,

Appellee.

BRIEF OF APPELLANT

TIPP, HOVEN & BRAULT
and
GORDON E. HOVEN
123 West Broadway Ave.
Missoula, Montana
Attorneys for
Plaintiff and
Appellant

FILED: October, 1967.

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I.

FEDERAL JURISDICTION

The jurisdiction of the District Court is based on diversity of citizenship in a controversy involving more than Ten Thousand Dollars ($10,000.00). The cause was originally instituted in Cascade County Montana, and removed to the U. S. District Court by the defendant on the grounds of diversity of citizenship, the plaintiff being a resident of the State of Montana, and the defendant corporation existing under and by virtue of the laws of the State of Minnesota. Thus, jurisdiction clearly exists under Title 28, Section 41 US Code Ann.

II.

STATEMENT OF CASE

The plaintiff filed the cause in Cascade County Court, Montana, wherein she sought damages for the deprivation by the defendant of the services, comfort, happiness, and the society and companionship of her husband by virtue of negligence of the defendant. In other words, a loss of consortium.

On January 18, 1967, after the removal of the case to the United States District Court for the District of Montana, Great Falls Division, the defendant filed a Motion to Dismiss under the Federal Rules

of Civil Procedure, Rule 12 (b) on the grounds that the Complaint failed to state a claim against the defendant upon which relief might be granted.

At about the same time, the defendant sought admissions from the plaintiff, all of which were subsequently admitted and which, in substance, set forth that the husband of the plaintiff, Don Jess, had instituted an action under the Federal Employer's Liability Act,wherein he sought damages for negligence of the defendant railroad, and which was resolved in favor of the defendant railroad.

On May 26, 1967, the Honorable Russell E. Smith, Judge presiding in the District Court, rendered his opinion and order to the effect that the Motion to Dismiss would be granted and the Court directed that all relief be denied to the plaintiff. As a result thereof, on the 6th day of June, 1967, Judgment of Dismissal was entered by the defendant against the plaintiff and appellant.

III.

SPECIFICATION OF ERROR

The lower Court erred in granting the Motion to Dismiss and directing that Judgement be entered against the defendant.

IV.

ARGUMENT

The Complaint, in substance, alleges that the plaintiff is the wife of Don Jess; that Don Jess was injured on January 12, 1965, while in the employ of the Great Northern Railroad; that the injury to her husband was a result of the negligence on the part of the defendant and as a result thereof, she was deprived of the companionship, society, services and comfort of her husband.

A. LOSS OF CONSORTIUM

The question that arises whether or not there exists in the State of Montana, a right in the plaintiff to sue for such losses as is generally found under the phrase "loss of consortium". While the lower Court in its order and opinion used the phrase, "conceding that the wife in Montana may ordinarily sue for loss of consortium" we deem it necessary to cite the law of the State of Montana so that this Court may understand that under the Montana Law there is no question, whatsoever, as to the rights of the wife to institute and prosecute as such a cause.

In the case of Duffy vs. Lipsman, Fulkerson & Co., 200 Federal Supplement 71 (1961) the Court there had the question directly presented to it and

said at page 72 thereof,

> "Defendant's Motion to Dismiss is based upon contingent that under Montana law, a wife has no action for loss of consortium when such loss is a result of negligent injury to her husband."

The Court concluded that while there was no statute in Montana giving the wife a cause of action for loss of consortium, that the Montana Supreme Court had not passed on that question, there was, and is such a cause of action in Montana. The cause of action is divided into two parts:

1. The right that as set forth in 48-101 Revised Codes of Montana, 1947:

> "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary..."

and,

2. The Second part, which is an infringement of those rights as therein set forth in the sections quoted.

In the case of Wallace vs. Wallace, 85 Montana 492; 279 Pac 374; 66 ALR 587, (1929) the Court said;

> "In addition to support, a wife is entitled to the aid, protection, affection, and society of her husband,"

and,

"... the husband's right to recovery for loss of consortium of his wife due to negligence was well recognized at common law. See annotation in 21 ALR 1519."

The Married Woman's Act, as enacted in the State of Montana and set forth in Section 36-110 of Revised Codes Montana, 1947:

"A married woman in her own name may prosecute action for her reputation, person, property and character, or for the enforcement of any legal or equitable right and may in like manner defend any action brought against herself."

and Section 36-128, Revised Codes Montana, 1947:

"A married woman may sue and be sued in the same manner as if she were sole."

places the wife on the same footing as her husband. In other words, the wife has, in the State of Montana, the same right to sue for a loss of consortium as the husband would have.

In the case of Dutton vs Hightower 214 Fed Sup 298 (1963) the court reaffirmed its decision in the Duffy-Lipsman case, supra, that;

"A wife has the right to recover damages for loss of consortium resulting injuries negligently inflicted on her husband by the defendant."

We respectfully submit that the concession as set forth in the opinion and Order by the lower Court is entirely correct inthat a wife in Montana

may sue for loss of consortium.

B. EFFECT OF FELA

The next question that presents itself is whether or not the enactment of the Federal Employer's Liability Act destroys the right in the wife to sue for loss of consortium.

That part of the Federal Employer's Liability Act, 45 USCA, Sec. 51, insofar as applicable to the issues presently before this Court, reads as follows:

> "Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; ...
>
> "Every common carrier by railroad ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury ... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, traffic, roadbed, works, boats, wharves, or other equipment.***"

It is to be clearly understood from a reading of the Complaint that the plaintiff does not contend that her action is brought under the foregoing enactment. The plaintiff is suing under Montana Law, for her loss of consortium resulting from her husband's injuries occasioned by the negligence of the defendant.

This claim is the plaintiff's personal and separate claim. The fact that the plaintiff's husband could, and did, bring an action under the Federal Employer's Liability Act, has no effect upon the rights of the plaintiff. It is a claim personal to the plaintiff and quite independent of any claim that her husband might have under the FELA.

We quote from the FELA 45 USCA, Sec. 51:

> "Every common carrier ... shall be liable in damages to any person suffering injury while he is employed by ... (an interstate) carrier in (interstate) commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence (of the said common carrier)***." (emphasis added.)

The next important decision at about the same time and in the year 1917 came about by virtue of the consolidation of two cases of the New York Central and Hudson River Railroad Company vs. Tonsellito, an infant, and The New York Central and Hudson River Railroad Company vs. Tonsillito, 244 US 361 (1917). In the course of our discussion we will generally refer to this citation as the Tonsellito case. The facts briefly are as follows:

"A minor had been employed in interstate tasks by a railroad engaged in interstate commerce. The minor was injured. The father of the minor brought two actions; one for damages on behalf of his son, and the other was brought by the father on his own behalf to recover the loss of his son's services and for medical expenses incident to the injuries his minor son had received. The United States Supreme Court affirmed the father's recovery of damages on behalf of the son but reversed the award to the father for the father's damages for loss of his son's services and the medical expenses. In denying the father's right to recover on his own behalf the Court used language to the effect that the remedies provided by F.E.L.A. were the only remedies which could be used by any and all persons to recover from railroad when the injuries arose out of tasks in interstate commerce. The Court went on to say at page 361 that:

"The act is comprehensive and also exclusive in respect of a railroad's liability for injuries suffered by its employees while engaged in interstate commerce. It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce and in that field it is both paramount and exclusive, Congress having declared when, how far, and to whom carriers shall be liable they can neither be extended nor abridged by common or statutory laws of the State."

We discuss the Winfield and Tonsellito decisions because of the fact that in the Winfield case, the lower Court cites the Tonsellito case as authority for its decision.

In the case of Louisville & Nashville Railroad Co. and others, vs. Lundsford, 216 Georgia 289, 116 South Eastern Second 232 (1960) the Georgia Supreme Court, we submit, was mistaken in its thinking that the only question presented was;

> "Whether a wife may sue for loss of consortium occasioned by an injury which her husband, an Interstate employee of a Railroad Company, sustained in consequence of his employer's negligence as against the defendant's contention that the Congress, in passing the FELA preempted that field of legislation and excluded all remedies which might be resorted to for injuries to employees other than those provided for by such act."

> "The Court decided that FELA pre-empted all state remedies which anyone might resort to for damages arising from injuries to employees employed in interstate tasks by a railroad operating in interstate commerce.

> "The George Court in this opinion continued the misinterpretation of the Winfield decisions first committed in the Tonsellito decision and added a new error of its own. In the Tonsellito decision the Court must have known that the father would have recovered in the first action all that he might have recovered in the second action. But the Georgia Court in Lundsford could not have used that reasoning. If the husband were to sue the railroad and collect damages those damages would not include the damages to the wife occasioned by her loss of consortium. That is to say, the wife of an injured employee has an independent right to recover for damages for loss

> of consortium. Accordingly if the wife were to sue for her loss of consortium although her husband might recover under FELA for his injury, there would be no danger of double recovery . The Winfield decisions, upon which the Georgia Court in Lunsford and the United States Supreme Court in Tonsellito really say nothing more than that persons having a right to sue under FELA must recover from the railroad by means of remedies given them by FELA and cannot recover under State law. FELA does not give the wife of an injured employee the right to sue for her separate loss of consortium. But the Lunsford decision goes so far as to use unnecessary language that a person who has an independent right to sue which arises out of the injury to an employee may not recovery under FELA, may not recover under State law, may not recover at all. The Lunsford decision is further weakened by the fact that the Georgia Supreme Court had a history of uncertainty regarding whether a wife could sue for loss of consortium.

In 1950, in the case of Hitaffer vs. Argonne Co. 87 App. D.C. 57, 183 F2nd, 23 ALR 2nd 1366 (1950) the question was directly presented to the Court. The Wife was permitted to bring an action for loss of consortium even though her husband was injured and previously permitted to make recovery under the Federal Workman's Compensation Statute for the District of Columbia, 33 USCA Sec. 907, 908; It should be pointed out that Section 905 of the Workmen's Compensation Act provided as follows:

"The liability of an employer prescribed in Section 904 of this Chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband, or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death..." (emphasis added.)

At page 1376 of 23 ALR 2d the Court said:

"There can be no doubt but that this section (meaning the Workmen's Compensation Act, Section 905) is designed to make the employer's liability under this statute exclusive of any other liability either at law... to the injured employee, or anyone suing in the employee's right. But where a third person is suing in his or her own right, on account of the breach of some independent duty owed them by the employer, even though the operative facts out of which this independent right...arose are the same as those out of which the injured employee recovers under the Act, the Act does not proscribe the third person's cause of action." (emphasis added.)

At page 1377 of 23 ALR 2d the Court says:

"There can be no doubt, therefore, that injury to the consortium is an injury to a right which is independent of any right in the other spouse and to which the defendant owes an independent duty, and in view of the fact that this appellant is suing in her own right for the breach of an independent duty owing her, we cannot see that the Act

(meaning the Federal Workmen's Compensation Act) was designed to deprive her of her action.

"Moreover, it would be contrary to reason to hold that this Act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employees or persons suing in the employee's right on account of employment connected disability or death. It can hardly be said that it was intended to deprive third persons of independent causes of action where the Acts does not even purport to compensate them for any Loss. A brief examination of it will reveal that there is no provision therein for compensating a spouse for the loss of consortium. (It must be noted here that there is no provision in F.E.L.A. for compensating a spouse for the loss of consortium). As we have already pointed out, no distinction is made as between the amount of compensation payable to married and unmarried injured male claimants, despite the fact that the latter was under a legal duty tosupport the wife, and any impairment of the ability to perform that duty is a compensable element of damages, belonging to the wife where the husband has failed to recover therefor." (Emphasis added.)

The Hitaffer decision was over-ruled by Smither & Co. vs. Coles 242 F2d 220 (U. S. Court of Appeals - D. C. - 1957).

It is the opinion of the writer however, that the decision as rendered in the Duffy case, supra, is well reasoned and is far better taken than the Smithers case and we quote at page 74 thereof:

> "Finally, defendants point out that where this question (the question whether a wife has an action for loss of consortium inflicted by defendant's negligent act) has been presented in other jurisdictions, the overwhelming weight of authority is against permitting this action, and this is true. However, the trend of authorities is in the other direction. As pointed out in Hitaffer ... only one case was found prior to that decision which permitted the action, and that case had been overruled. However, in the 11½ years since the Hitaffer decision permitting the action was rendered, (a number of jurisdictions have recognized the right of the wife to maintain such action)...
>
> "***All of the grounds advanced by the various Courts for refusing to permit the action are taken up, discussed and demolished as being completely unreasonable and illogical in the opinion of Hitaffer vs. Argonne Co., supra.."(emphasis added

It will be remembered that one of the grounds advanced in Hitaffer for denying the wife the right to sue was the fact that there was a Workmen's Compensation Act under which the husband could recover.

If the Tonsellito decision and the Lundsford decision, upon which it relies means that an injured employee may sue under the F.E.L.A. but that his wife may not exercise her independent right to sue for loss of consortium under Montana Law, then

we submit that the decisions violate a basic principal of the Federal System.

In 16 Am Jur 2d at page 445:

> "A State law is superceded by a Congressional law only to such an extent as the two are inconsistent. An Act of Congress may occupy only a limited portion of the field of regulation of a particular subject matter, leaving unimpaired the right of the several states to enact regulations covering other aspects of the subject or merely to supplement the Federal Legislation in respect to local conditions. As respects Federal legislation of limited scope, it has been said that in determining whether a State regulation has been pre-empted by Federal action, the intent to supercede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field; such an intent on the part of Congress, fairly interpreted, in actual conflict with the law of the State."

In 16 Am Jur 2d, page 466, with supporting citations, it is written:

> "...it will not be held that a Federal Statute was intended to supercede the exercise of the power of the State, unless there is this clear manifestation of intention, since the exercise of Federal supremacy is not lightly to be presumed. The test of whether both Federal and State regulation must give way, is whether both regulations can be enforced without

> impairing the Federal superintendents of the field, not whether they are aimed at the same or different objectives."

Plaintiff contends that to allow her to bring an action for loss of consortium under Montana law does not interfere with the Federal legislation commonly referred to as F.E.L.A., inthat there is no provision in F.E.L.A. by which the wife can recover for loss of consortium.

V. CONCLUSION

We respectfully submit, in conclusion, as follows:

1. That there is no method or means provided in the F.E.L.A. whereby the plaintiff might recover under that act for the wife is given no right therein to sue for damages when her husband had merely been injured. There is no section of that act that states that it is to be exclusive remedy for any person who might have suffered a damage to their rights because an employee was injured. Nevertheless, we submit the lower Court has come to that conclusion by reasoning that the wife cannot sue for an injury to an independent right if the injury arose out of the "same transaction" in which the husband received his injury and further, if the husband could sue for those injuries under the F.E.L.A. Thus, the lower Court denies the plaintiff's right to sue for loss of consortium

under the Montana law, merely because the plaintiff's husband could sue under the F.E.L.A. The lower Court then permits the husband, by virtue of his actions, to destroy an existing legal right invested in the plaintiff.

The conclusion drawn by the defendant violates several basic thoughts:

(1) One injured by the negligent act of another should be allowed compensation for her suffering;

(2) F.E.L.A. was written so that injured employees of interstate railroads would be able to recover damages and the defendant's conclusion that the wife cannot sue is inconsistent with F.E.L.A.'s broad humane purpose;

(3) When there is a question whether a Federal Act overrides a State law, the State law is not to be set aside unless there is an obvious repugnancy or the Congress clearly manifested its intention

to void State Law. Head vs. New Mexico Board of Examiners, 374 U.S. 424, 10L.ed 2d 983, 83 S.Ct. 1759; Kelly vs. Washington, 302 U.S. 1, 82 L.Ad 3, 58 S.Ct. 87; California vs. Zook 336 U.S. 725, 93 L.ed 1005, 69 S.Ct. 841.

2. The F.E.L.A. has no place in the discussion of the instant case. The rights of the plaintiff are based upon and secured by the laws of the State of Montana; such rights have not been, nor should they be destroyed by the enactment of a Federal Statute.

Respectfully submitted,

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C E R T I F I C A T E

The undersigned counsel for the appellant certify the provisions of Rules 18 and 19 of the U. S. Court of Appeals for the Ninth Circuit have been examined and that in their opinion the foregoing brief conforms to all requirements of those rules.

VERNON HOVEN

Service of three (3) copies of the appellant's brief acknowledged this____day of October, 1967.

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